In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1065

ALLEN LEVAIR JORDAN AND ALVINA LAJAN JOHNSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Jordan was convicted of offenses under 21 U.S.C. 174 and 26 U.S.C. 4705(a), arising out of sales of heroin on April 24 and April 28, 1967. Petitioner Johnson was convicted of offenses under the same two statutes arising out of a sale of heroin on June 15, 1967. In addition, Jordan was convicted of concealing heroin and cocaine (count 10) and marihuana (count 11) found in his residence when he was arrested. The trial judge directed a verdict of acquittal as to Miss Johnson on these two counts. Each petitioner was sentenced to imprisonment for five years on each count on which each was convicted, the sentences to

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run concurrently. The court of appeals affirmed on all counts (Pet. App. A), except that it reversed Jordan's conviction for concealing marihuana and declined to reach the question of the validity of the search which produced the narcotics forming the basis of Jordan's conviction on count 10.

On April 24 and April 28, 1967, agent William Jackson of the Treasury Department and Thomas Small, an informer, bought heroin from petitioner Jordan (Tr. 292–293, 301–302). On June 15, 1967, a similar purchase was made from petitioner Johnson (Tr. 304). In order to ascertain the identity of the seller, the agent had the license plate traced through the division of motor vehicles. The owner was identified as James C. Jordan. Armed with an arrest warrant for John Doe, also known as James C. Jordan, federal agents proceeded to James Jordan's place of employment and placed him under arrest. Agent Jackson was not among the officers who made the arrest; when he saw James C. Jordan, he stated that this was not the man from whom he had acquired the heroin. After some discussion it was determined that it was James Jordan's brother, Allen, whom they were seeking.

Accompanied by James, they drove to petitioner Allen Jordan's residence. While the officers were attempting to ascertain if there was anyone at home, petitioner Johnson alighted from a car. The officers identified themselves to her and, pursuant to another warrant, placed her under arrest. She was advised of her constitutional rights. Petitioner Johnson asked if she could enter the house to put the groceries in the kitchen. She entered the house and told the agents

to be seated in the living room while she put the groceries away (Tr. 401). The agents informed her that she was to be taken to jail. They asked if they could wait for Allen as they were going to arrest Allen also (Tr. 18, 400). Miss Johnson replied that they could (Tr. 18).

When petitioner Jordan entered the house, he was placed under arrest. Agent Krueger requested and was denied permission to search the house (Tr. 29). The agent said he was going to search the house notwithstanding the refusal. When he opened the door of a closet, which could be viewed from the living room, petitioner Jordan turned to one of the agents and said, "You'll find it all there on the second shelf in a blue bag" (Tr. 29). In the closet the agent found a blue airline bag which contained heroin, cocaine and marihuana.

Petitioners' attacks on the constitutionality of 26 U.S.C. 4705(a) and 21 U.S.C. 174 have been resolved against them by this Court's decisions in *Minor* v. *United States,* No. 189, decided December 8, 1969, and *Turner* v. *United States*, No. 190, decided January 20, 1970.

As to count 10, which the court below declined to reach, petitioners contend that the search of the house was unlawful and that the finding of the narcotics must have influenced the jury on the sale counts. The jury, however, were informed that Miss Johnson was acquitted on the counts arising out of the search. Thus, they manifestly credited the testimony of the government witnesses as to the purchases from both petitioners, without reference to the products of the search.

In any event, the search was incident to the arrest of Jordan, which, as the court below found, was based on probable cause. The courts of appeals which have reached the question have concluded that the ruling of *Chimel* v. *California*, 395 U.S. 752, ought not to be applied retroactively to searches, like the one here, conducted prior to the date of that decision. See the government's briefs in opposition in *Lyon* v. *United States*, No. 1072 Misc., certiorari denied, January 12, 1970 and *Satterfield* v. *United States*, No. 603 Misc., this Term.* Nor does the presence of cocaine require reversal of this count in light of *Turner* v. *United States*, No. 190, this Term, decided January 20, 1970. Heroin was also found, and "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.*, sl. op. at 21.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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*On February 2, 1970, this Court granted a writ of certiorari in *Elkanich* v. *United States*, No. 963 Misc., now No. 1142, which raises the retroactivity issue. In view of the other factors set out above, however, we believe it would be unnecessary to hold this case pending argument and decision in *Elkanich*.

U.S. GOVERNMENT PRINTING OFFICE: 1970